Nos. 04-277 and 04-281

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Telecommunications Industry Association ("TIA") respectfully submits this brief *amicus curiae* in support of petitioners.[1]

[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part. No persons other than *amicus curiae* or their counsel made a monetary contribution to the preparation or

TIA is a trade association comprised of 700 member companies that manufacture or otherwise supply some of the most sophisticated technology products and services used in both the telecommunications and information services industries. Its membership ranges from large multi-national corporations that generate hundreds of millions of dollars in revenue to smaller niche providers of highly specialized products and services.

As the designers and manufacturers of the equipment and other technology products that make information services possible, TIA members are directly affected by changes in the regulatory environment for those services. TIA members and their customers currently operate in an unregulated information services market that responds rapidly and efficiently to shifts in consumer demand and rewards a high level of innovative product development. TIA and its customers have considerable expertise regarding when (and which) features and functions of technology products can expose customers to the more burdensome regulations that apply to providers of "telecommunications." TIA members therefore have an interest in maintaining the stability and continuity of the Federal Communication Commission's policies governing the nature and marketability of their products.

TIA supports legislative and regulatory efforts that encourage the rapid deployment of advanced telecommunications services to all Americans and promote investment in appropriate infrastructure to ensure delivery of such products and services. The members of TIA have a vital interest in ensuring that the markets for all forms of communications technology products and services remain competitive, hospitable to new investment, and appropriately regulated, to

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submission of this brief. Letters reflecting the consent to the filing of this brief by all parties named in the Court's docket have been submitted to the Clerk under separate cover.

maintain incentives for investment in new infrastructure and in innovative products and service offerings.

SUMMARY OF ARGUMENT

Cable modem services provide customers with high-speed (or "broadband") Internet access. But Internet access services constitute only a small fraction of the rich array of computer-enhanced data management and data processing services offered as "information services" in today's information technology market. As the result of a landmark decision in the FCC's *Computer Inquiry* proceeding[2] nearly twenty-five years ago, information services, or "enhanced services" as they were then known, have flourished in a robustly competitive, unregulated market. The FCC drew a critical distinction in that proceeding between enhanced services and so-called "basic services," (now known as "telecommunications"). The FCC concluded that basic and enhanced services fall into two separate and distinct service categories, have separate and distinct competitive characteristics, and are therefore subject to different sections of the Communications Act. While basic telecommunications services are subject to common carrier regulation under Title II of the Act, enhanced or information services are not.

Despite the differences between the two types of service, the FCC recognized that many information services include not only data and computer processing capabilities but also a basic telecommunications component. Data storage and retrieval services, for example, often use telecommunications links to interconnect remote databases and deliver retrieved data to a single point of contact with the customer of the service. The FCC therefore included within the category of unregulated enhanced services those services that include a

[2] The *Computer Inquiry* proceeding is discussed in greater detail in section I. B., *infra*, at 7-11.

basic service component if, as a functional matter, the basic service is so integrated into the final product that the consumer receives a single integrated offering. The FCC's approach to defining and regulating basic and enhanced services has since been codified through the statutory definitions of "information services" and "telecommunications" which were added to the Communications Act by Congress in the 1996 Telecommunications Act.

Applying those statutory definitions to cable modem service, the FCC concluded in its declaratory ruling that, like all other Internet access services, cable modem service is an information service because the telecommunications component of the service is an integral, inseparable part of a single comprehensive offering. Cable modem customers cannot obtain Internet access without that telecommunications component, and they cannot use the telecommunications component for any function other than Internet access.

Because cable modem service provides customers with a single integrated offering, it does not provide a "telecommunications service" any more than a baker includes an offering of flour, and thereby becomes a miller, by selling a cake.

The Ninth Circuit decisions under review mischaracterize cable modem service by artificially isolating an otherwise integrated transmission component and concluding that cable modem service providers offer a telecommunications service. That conclusion undermines long-standing FCC precedent and the statutory provisions codifying that precedent which were included in the 1996 Act. If the Ninth Circuit decisions are allowed to stand, the vast majority of contemporary information service providers, that have never been deemed providers of telecommunications, would face potential regulation as a result of the integrated transmission components in their information service offerings.

Finally, the statutory purposes and policy objectives of the Communications Act are furthered by the FCC's classification of cable modem service as an information service and are undermined by the regulatory threat that results from the Ninth Circuit's decisions. In the 1996 Telecommunications Act, Congress directed the FCC to encourage the deployment of broadband services by removing barriers to infrastructure investment, and to preserve the competitive free market for the Internet, unfettered by Federal or state regulation. The Ninth Circuit's decisions do just the opposite. By exposing cable modem service providers to the threat of federal regulation as Title II common carriers, the decisions create barriers to competitive entry by cable systems and discourage cable systems from investing in the broadband infrastructure required for emerging Internet-based and other information services.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION UNDERMINES WELL-ESTABLISHED STATUTORY INTERPRETATIONS AND REGULATORY POLICIES

The Ninth Circuit's decisions in *Brand X Internet Services, et al. v. FCC*, Pet. App. 2a, and *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), advance a new interpretation of the definitions for "telecommunications" and "information service" in the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, (the "Act"), that re-draws the boundary between regulated telecommunications services and unregulated information services. The appeals court's new interpretation disregards a twenty-five year-old body of regulatory law interpreting the Act and would adversely affect far more than the nascent market for residential high-speed access to the Internet that was the focus of the decision below. The market for what the Act calls "information services" covers much more than cable modem service, including a wide

variety of products and services that play crucial though less visible roles in the proper functioning of the national economy. The vitality of that market would be severely compromised—and the rate of technology diffusion would be substantially impaired—by the profound and abrupt disruption of the statutory scheme and the Federal Communications Commission's ("FCC") regulatory framework that would result if the Ninth Circuit's decision were to stand.

A. The definitions in the Communications Act determine the scope of the FCC's jurisdiction over cable modem service

The definitions in the Communications Act for "telecommunications" and "information services" frame the FCC's regulatory authority over cable modem service. Section 3(43) of the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). An "information service" is defined in Section 3(20) of the Act as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

The Act defines the services from the customer's perspective; the definitions refer to the functions offered to the end user, not the facilities that a vendor may use to produce or deliver those functions. *See also* 47 U.S.C. § 153(46) (defining "telecommunications service" as the offering of telecommunications to the public for a fee "regardless of the facilities used"). Accordingly, a service can fall within the

definition of an information service whether the service uses cable network facilities or traditional telephone network facilities. Moreover, by defining an "information service" as a capability that is provided "via telecommunications," the Act specifically recognizes the intertwined nature of the basic transmission services that constitute "telecommunications" and the data processing functions that information service providers ("ISPs") combine with telecommunications to create an information service.

B. Cable modem service is an "enhanced" or "information service" under long-standing FCC precedent interpreting the Act's definitions

The FCC's application of these statutory definitions in its *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* Pet. App. 40a, (*"Declaratory Ruling"*), is consistent with both the long-standing regulatory framework for the services that fall within these definitions and the functional role of telecommunications in the provision of contemporary information services.

As the appeals court below acknowledged in *Brand X*, Pet. App. at 6a, the Act's 1996 definitions for telecommunications and information services[3] track the FCC's answer to a question posed nearly twenty-five years ago in its *Computer II* rulemaking:[4] where is the dividing line between traditional

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[3] "Information services" is "the codified term for what the FCC first called 'enhanced services.'" *City of Portland*, 216 F.3d 871.

[4] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II Final Decision*"), *on reconsideration*, Memorandum Opinion and Order, 84 F.C.C.2d 50 (1980) and Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198

telecommunications and the emerging data processing services that use telecommunications services to create new technology products and services? The FCC initiated the *Computer II* proceeding because it recognized the "regulatory problems raised by the confluence of communications and data processing," *Computer II Final Decision*, 77 F.C.C.2d at 386, para. 2, and the "greater utilization of computer processing technology and its varied market applications." *Id.* at 385, para. 1. The FCC addressed those problems in part by dividing the communications world into services classified as either "basic" or "enhanced," categories that were essentially re-named and codified by the 1996 amendments to the Act as "telecommunications," which corresponds to basic service, and "information services," which corresponds to enhanced services.[5]

(D.C. Cir. 1982), *cert. denied sub nom. Louisiana Public Serv. Comm'n v. FCC*, 461 U.S. 938 (1983). *See generally Declaratory Ruling*, at Pet. App. 89a n.139 and decisions cited therein.

[5] In its First Report and Order and Further Notice of Proposed Rulemaking in *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21905 (1996) ("*Non-Accounting Safeguards Order"*), *request by FCC for voluntary remand granted, Bell Atlantic Tel. Cos. v. FCC*, No. 99-1479, 2000 U.S. App. LEXIS 35367, at *1 (D.C. Cir. Oct. 27, 2000), Order on Remand, 16 F.C.C.R. 9751 (2001), the Commission concluded that the statutory term "telecommunications service" corresponds to the Commission's *Computer II* definition of a basic service, the statutory term "information service" corresponds to the definition of an enhanced service, and all of the services considered by the Commission to be "enhanced services" are "information services" as defined in the Act. *Non-Accounting Safeguards Order*, 11 F.C.C.R. at 21955-58, paras. 102-07. The Commission found that, like basic services and enhanced services, telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services. *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, 11507-08, 11516-17, paras. 13, 33 (1998) ("*Universal Service Report*").

The Commission defined basic service as the offering of a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Final Decision*, 77 F.C.C.2d at 420, para. 96. Enhanced service was a service that "*combines basic service* with computer processing applications [that] . . . act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387, para. 6 (emphasis added).

In the decision adopting these definitions, the Commission highlighted the role of "basic" service (now "telecommunications") as an integrated component in many "enhanced" (now "information") services, defined the category of enhanced services broadly to include such integrated services, and expressly declined to treat enhanced services differently from one another based on whether they did or did not have a basic or telecommunications component. Indeed, the FCC itself had originally proposed in the *Computer II* proceeding to differentiate among enhanced services on that basis but, after amassing and reviewing an extensive record, abandoned the proposal for a number of reasons:

> We have gone to great length in this proceeding to build a record which would best enable us to render a decision consistent with the mandate . . . in Section 1 of the Communications Act. Based on this record, the mandate of this Commission in a rapidly changing technological environment, the market developments resulting from the confluence of technologies, the impossibility of defining at the enhanced level a clear and stable point at which "communications" becomes "data processing," the ever increasing dependence upon common carrier transmission facilities in the movement of information, the need to tailor services to individual user require-

> ments, and the potential for unwarranted expansion of regulation, we conclude that the public interest would not be served by any classification scheme that attempts to distinguish [among] enhanced services based on the communications or data processing nature of the computer processing activity performed. Accordingly, we conclude that all enhanced computer services should be accorded the same regulatory treatment and that no regulatory scheme could be adopted which would rationally distinguish and classify enhanced services as either communications or data processing.

Id. at 428, para 113. The FCC recognized that its approach reduced the regulatory requirements applicable to enhanced services, even when such services included a telecommunications component, but concluded that:

> the nature of enhanced services and their market underscores the reasonableness of our decision. As indicated, we do not believe these are communications common carrier services within the meaning of Title II. We acknowledge, of course, the existence of a communications component. And we recognize that some enhanced services may do some of the same things that regulated communications services did in the past. On the other side, however, is the substantial data processing component in all these services.

Id. Accordingly, the Commission concluded that there was "no need to assert regulatory authority over data processing services *whether or not such services employ communication facilities* in order to link the terminals of the subscribers to centralized computers. We believe the market for these services will continue to burgeon and flourish best in the existing competitive environment." *Id.* at 433, para. 127, citing *First Computer Inquiry*, Tentative Decision, 28 F.C.C.2d at 298, para. 22 (emphasis in *Computer II Final Decision*).

The Commission also recognized that transmission and data processing technologies would continue to converge in

the future and consciously crafted a flexible definition of enhanced services that would allow ISPs to incorporate transmission functions into their information services without becoming regulated telecommunications providers:

> As the market applications of computer technology increase, communications capacity has become the necessary link allowing the technology to function more efficiently and more productively. . . . As a result, the computer industry and the communications industry are becoming more and more interwoven. We believe, and the record shows, that this trend will become even more pronounced in the future. . . . Thus, the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable.

Computer II Final Decision, at 422, para. 100.

Just as the FCC foresaw in 1980, telecommunications services have become an integral component of most contemporary information services. This is particularly true for Internet-based services, because the Internet itself results from the interconnection of individual computers by means of various telecommunications products and services, in combination with sophisticated protocol conversion and data processing services. By attempting to impose an artificial separation between an information service and the telecommunications that is an ingredient of that information service, the *Brand X* decision ignored the body of law that has developed around the FCC's classification scheme as well as the robust market for sophisticated information services and technologies that has emerged in the context of the FCC's regulatory treatment of information and telecommunications services.

Under the FCC's rulings described above, the service at issue in this case clearly falls within the statutory definition of an information service. Cable modem service provides

subscribers with Internet access, which the Commission has categorized in other contexts as an information service because the subscriber receives a single, integrated service that combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications. *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R 11501, 11539-40, para. 80 (1998) ("*Universal Service Report*").

Applying the same analysis to the Internet access provided by cable modem service, the FCC correctly concluded that the service constitutes an information service under the Act, like other Internet access services. The FCC found that cable modem service is presented to customers as a single integrated service, Pet. App. at 95a, para. 38,[6] that combines a number of information service functions. The integrated nature of the service is perhaps demonstrated most clearly by the fact that customers cannot use the telecommunications

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[6] This fundamental factual finding by the FCC in the *Declaratory Ruling*, which is the necessary starting point for any determination of the proper classification of cable modem service under the Act, was not available, of course, to inform the court's analysis in the *City of Portland* decision. And, as the FCC has stated previously,

> the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service. It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail. . . . But the matter is more complicated when it comes to offerings by facilities-based providers [such as cable systems]. . . . '[T]he issue is whether, functionally, the consumer is receiving two separate and distinct services.'

Universal Service Report, 13 F.C.C.R. at 11530, para. 60 (citations omitted).

component of cable modem service for any function other than accessing the Internet.

The FCC identified several information service functions that are components of cable modem service, including computer processing of data, the retrieval of information for the customer, and computer interaction with data transport, enabling end users to run a variety of applications.[7] *Declaratory Ruling*, Pet. App. at 91a, para. 36*; id*. at 56a n.43. In addition, as the FCC explained in the *Declaratory Ruling*, cable modem service provides subscribers with access to the Internet's domain name system ("DNS"), a "capability for . . . acquiring, . . . retrieving, . . . [and] utilizing" information, 47 U.S.C. § 153(20), that is central to the functioning of the Internet.[8] The FCC also found that cable modem service requires protocol conversion and IP address assignments. *Declaratory Ruling*, Pet. App. at 64a, para. 17 nn.72-73.

Because each of these functions qualifies individually as an "information service" under the Act, the FCC concluded that the provision of all these functions in a single service also constitutes an "information service." *Id.* at 93a-95a, para. 38. Based on these characteristics of the service, the FCC properly found that cable modem service "as currently provisioned", *id.* is an "information service" under the Act.

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[7] Examples of the applications typically offered to customers of cable modem service include e-mail, newsgroups, and the ability to create a web page. *Declaratory Ruling*, Pet. App. at 91a-95a, para. 37.

[8] The DNS is an on-line data retrieval and directory system that allows Internet routers to consult databases listing the numeric IP addresses that correspond to the alphabetic domain names used to identify web sites. One of the key functions of Internet access services like cable modem service is to provide customers with access to the information stored in the DNS databases. In other words, Internet access customers receive a data base retrieval service, the quintessential information service. *Declaratory Ruling*, Pet. App. at 91a, para. 37.

C. Cable modem service does not provide subscribers with a telecommunications service

The *Declaratory Ruling* also concluded that cable modem service does not, as a factual matter, include an offering to subscribers of a "telecommunications service," as defined by the Act. The FCC found that the telecommunications component of cable modem service is an integral, inseparable part of a single comprehensive offering. The FCC also found that cable systems do not currently offer,[9] on a "separate and distinct" basis, the underlying facilities-based transmission service they use to provide Internet access. *Id.* n.154.

Because cable modem service provides telecommunications only as a component that is inseparable from the data processing capabilities that make it an information service, the FCC was correct to conclude that the service does not include an offering of a "telecommunications service," any more than a baker includes an offering of flour, and thereby becomes a miller, by selling a cake.

D. The Ninth's Circuit's interpretation of the Act would expose the vast majority of information service providers to a significant regulatory risk

The FCC's interpretation of Section 3(20), 47 U.S.C. § 153(20), in the context of cable modem service is applicable to many, if not most, of the other information services available to consumers. Contemporary information services can, and typically do, include a transmission component that is obtained by the information service provider and provided to its customer as part of an integrated information service. Under the interpretation of Section

[9] The Commission emphasized that its finding applied to cable modem service "as currently provisioned," *Declaratory Ruling,* Pet. App. at 95a, para. 38; "as provided to the end user," *id.,* Pet. App. at 96a, para. 39.

3(20) that results from the *Brand X* decision, however, a broad variety of information service providers that have never been deemed providers of telecommunications would be exposed to regulation because the telecommunications component of their information services would be re-characterized as an offering of telecommunications under Section 3(43), 47 U.S.C. § 153(43).

An instructive example is the credit card validation service provided to merchants by credit card issuers. These services use secure, private data networks that connect point-of-sale terminals located at merchants' premises to remote databases that store account information. Those data networks may include transmission facilities owned and operated by the card validation service provider or transmission services obtained by the service provider from common carriers. Without the telecommunications component, card validation services could not exist. Yet under the interpretation of "information service" that results from the *Brand X* decision, providers of credit card validation services would be classified as providers of both information service and telecommunications, contrary to the FCC's long-standing regulatory treatment of such services as pure information services.[10]

The Court of Appeals' interpretation of Section 3(20) of the Act, 47 U .S.C. § 153(20), would also impose adverse and almost certainly unintended consequences on other purchasers of telecommunications service that are not ISPs. Businesses that purchase toll-free service, for example,

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[10] The *City of Portland* decision suggested that "control[] …of the transmission facilities between … subscribers and the Internet" was unique to cable modem service and distinguished it from other information services. 216 F.3d at 878. As the credit card validation example demonstrates, however, this is not an accurate characterization of other information services, many of which involve or even require the ISP's control of transmission facilities all the way to the customer's premises.

provide telecommunications service to callers when callers use the service to retrieve information from the toll-free purchaser (*e.g.*, airline reservation status information, customer service and product support). Under the Ninth Circuit's interpretation of Section 3(20), businesses that provide, via their purchase of toll-free service, the telecommunications connection used by their customers for database look-ups or other information retrieval would become providers of telecommunications subject to regulation by the FCC. Under the FCC's interpretation of the statutory definition in the *Declaratory Ruling*, however, the toll-free services provided by such businesses to their customers would continue to be treated merely as a component in the provision of a non-telecommunications service.

Thus the *Brand X* decision is problematic not only because it incorrectly classifies cable modem service under the Act but also because it effectively mandates the re-classification of a wide body of information services whose providers have long been considered outside the reach of the FCC's Title II jurisdiction over telecommunications providers.

II. THE FCC'S CLASSIFICATION OF CABLE MODEM SERVICE AS AN "INFORMATION SERVICE" SATISFIES THE STATUTORY PURPOSES AND POLICY OBJECTIVES OF THE COMMUNICATIONS ACT

The FCC's classification of cable modem service as an information service under Section 3(20) of the Act complies with the statutory mandates, and is necessary to achieve the policy objectives, established by Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), and in the 1996 Act's amendments to the Communications Act of 1934. In Section 706 of the 1996 Act, Congress recognized the significant evolution in the country's communications needs since the passage of the

Communications Act in 1934 and the value of ubiquitous public access to advanced telecommunications capabilities. *Declaratory Ruling*, Pet. App. at 47a, para. 4 n.14. Accordingly, Section 706 directs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . ." 1996 Act § 706 (reproduced in the notes to 47 U.S.C. § 157). It requires the FCC to promote this deployment through certain specific methods, including "regulatory forbearance, measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment."[11] *Id.*

In addition to promulgating Section 706, Congress added Section 230(b)(2) to the Act to provide guidance to the FCC regarding the appropriate treatment of emerging Internet-based services. Section 230(b)(2) declares it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

A. The FCC's principles for interpreting the Act are consistent with the Congressionally-mandated objective of encouraging the deployment of advanced services

In order to encourage the rapid deployment of broadband services and preserve the free market for Internet services in keeping with its Congressional mandate, the FCC identified certain "overarching principles" that it uses to guide its interpretation and application of the Act. The Commission

[11] *See also United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C.Cir. 2004) (in rulemaking to implement Section 251(d)(2) of the Act, FCC can consider whether new rules would create excessive impediments to infrastructure investment because "Section 706(a) identifies one of the Act's goals beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment.").

used these principles to interpret the Act's definitions and determine whether cable modem service should be treated as a telecommunications service or an information service. *Declaratory Ruling*, Pet. App. at 46a, para. 4. The Commission's principles are consistent with the statutory objectives imposed by Congress and ensure that the FCC's decision to classify cable modem service as an "information service" will serve the policy goals identified by Congress.

1. *Encouraging the ubiquitous availability of broadband services*

The FCC has declared that its primary policy goal is to "encourage the ubiquitous availability of broadband for all Americans." *Id.* (citing *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019, 3021, para. 3 (2002) ("*Wireline Broadband NPRM*")). The FCC has identified widespread deployment of broadband infrastructure as "the central communications policy objective of the day" because it is likely to "bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public." *Id.* at 3021, para. 1. The ubiquitous deployment of broadband services is therefore essential to enhancing the pace of technological progress and maintaining the nation's continued economic expansion.[12]

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[12] The executive branch has identified widespread broadband deployment as an important national priority, *see* White House, *A New Generation of American Innovation* 11 (Apr. 2004), *available at* http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf, and President George W. Bush has emphasized the benefits resulting from such deployment. *Id.; see also Improving Right-of-Way Management Across Federal Lands to Spur Greater Broadband Deployment*, Mem. For the Heads of Exec. Dep'ts, and Agencies 40 Weekly Comp.

The Commission's goal of encouraging ubiquitous broadband availability implements the Congressional directive in Section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 1996 Act § 706. Indeed, should the Commission determine that advanced telecommunications capabilities are not being deployed to all Americans in a timely fashion, the Commission is directed to take immediate action to accelerate deployment. By seeking ubiquitous availability for broadband services through its interpretation and applications of the Act, the Commission is acting in accordance with its Congressional mandate.

2. *Creating a minimal regulatory environment*

To achieve the deployment objectives of Section 706, the Commission concluded that its policies and regulations must promote investment in advanced services and broadband facilities. Section 706 directs the Commission to remove barriers to such infrastructure investment if it determines that advanced telecommunications capabilities are not being deployed in a reasonable and timely fashion.

In the *Declaratory Ruling*, the Commission reiterated its commitment to "a minimal regulatory environment" for broadband as the best means of promoting investment and innovation. Pet. App. at 47a, para. 5, citing *Wireline Broadband NPRM*, 17 F.C.C.R. at 3022, para. 5. The Commission had previously recognized that substantial investment will be required to build out the advanced networks that can support new and innovative broadband applications and capabilities. *Id.* But the Commission also concluded that regulatory uncertainty or the threat of unnecessary or unduly

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Pres. Doc. 696 (May 3, 2004) ("Broadband has the potential to bring new services and products to American consumers and businesses postering innovation, investment and job producing growth.").

burdensome regulatory costs can discourage such investment and undermine the competitive free market for Internet services. *Id.* Moreover, a heavy-handed regulatory approach would run afoul of the Congressional mandate in Section 230(b)(2) of the Act to preserve a market for Internet and other "interactive computer services" that is unfettered by Federal and State regulation. Accordingly, the Commission's reliance on the investment-stimulating effects of a minimal regulatory environment is consistent with Congressional objectives.

3. *Applying an even-handed analytical approach to different technologies*

The Commission observed in the *Declaratory Ruling* that different technologies and network architectures for broadband access services are emerging from multiple platforms in addition to cable modem service, such as residential DSL service over wireline, terrestrial wireless technologies, and satellite services. Pet. App. at 48a, para. 6. The FCC concluded that its treatment of broadband services must be consistent, to the extent possible, across multiple technology platforms in order to promote their development, and thus competition, in the provision of broadband capabilities. Competitive investments in these multiple platforms ensure that the needs and demands of the consuming public will be met efficiently. By using an analytical approach that is, "to the extent possible, consistent across multiple platforms," *id.*, the FCC can also ensure that its decisions further the Congressional objective of promoting the deployment of high speed telecommunications capabilities "without regard to any transmission media or technology." 1996 Act § 706.

B. The FCC's interpretation of Section 3(20) and classification of cable modem service as an information service is consistent with the Act's policy objectives and the FCC's principles for achieving those objectives

By classifying cable modem service as an information service, subject to minimal regulation under Title I of the Act, the FCC's declaratory ruling serves the statutory objectives in Sections 706 of the 1996 Act and 230(b)(2) of the Act. The decision eliminates regulatory uncertainty, regulatory barriers to infrastructure investment, and burdensome regulatory compliance costs which could otherwise discourage the deployment of competitive broadband facilities and thus slow the pace of technological progress and economic expansion.

The FCC's classification of cable modem service as an information service is also consistent with each of its overarching principles for ensuring compliance with the policy objectives of the statute, namely, that the FCC's rules and policies encourage ubiquitous deployment of broadband technology, that broadband services be provided in an environment with minimal regulation, and that any regulation apply consistently across multiple technology platforms.

The FCC's ability to achieve these objectives would be undermined substantially if this Court allows the Ninth Circuit to override the FCC's classification of cable modem service as an information service and instead requires the FCC to regulate cable modem service as a telecommunications service. That regulation would impose a significant burden on providers and potential providers of cable modem service and similar Internet access services. It would discourage competitive investment in the broadband infrastructure required for emerging Internet-based and other information services. It would discourage expansion of existing broadband networks to reach currently unserved areas, thwarting the FCC's efforts to achieve ubiquitous

deployment in accordance with its statutory mandate. It would undermine the development of new and innovative services and reduce consumer choice.

Most importantly, it would fundamentally change the deregulatory regime governing all information service providers, increasing the costs of existing services and chilling the development of new, innovative, and heretofore unregulated information services.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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